IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

MELISSA MAYS, et al.,
Plaintiff-Appellees,

v

DARNELL EARLEY and GERALD AMBROSE,
Defendant-Appellants,

and

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendants.

Supreme Court Nos. 157335, 157340

Court of Appeals Nos. 335555, 335725, 335726

Court of Claims No. 16-17-MM

_____/

OMNIBUS REPLY IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL BY FORMER EMERGENCY MANAGERS, DARNELL EARLEY AND GERALD AMBROSE

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I. INTRODUCTION

Former Emergency Managers, Darnell Earley and Gerald Ambrose, file this Omnibus Reply in support of their Application for Leave to Appeal. Since these issues have significant public interest, involve legal principles of major significance to the State's jurisprudence, and because the decisions of the Court of Appeals conflict with the prior directives of this Court, leave to appeal is warranted on the issues raised by the former Emergency Managers in their Application for Leave to Appeal. However, leave is not warranted as to the Court of Appeals finding that the former Emergency Managers were state officers, subject to Court of Claims jurisdiction.

II. ANALYSIS

A. THE COURT OF APPEALS IMPROPERLY SUBSTITUTED ITS OWN POLICY JUDGMENT FOR THAT OF THE LEGISLATURE WHEN IT FAILED TO ENFORCE MCL §600.6431'S NOTICE REQUIREMENT

Statutory notice requirements must be enforced as written. *See Rowland v Washtenaw Cty Rd Comm'n*, 477 Mich 197, 219, 731 NW2d 41, 55 (2007) ("The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written"). This includes Legislative decisions permitting suit against the government only after timely and sufficient notice. *Id.* at 212 ("[C]ommon sense counsels that inasmuch as the Legislature is not even required to provide a defective highway exception to governmental immunity, it surely has the authority to allow such suits only upon compliance with rational notice limits"). It thus follows that judicially-created savings constructions reducing the obligation to comply with statutory notice requirements are prohibited. *McCahan v Brennan*, 492 Mich 730, 746-47, 822 NW2d 747, 756 (2012).

Plaintiffs' Answer argues that: (1) fact questions exist, as to when their claims accrued, such that summary disposition for failure to provide timely notice was inappropriate; (2) the harsh and unreasonable consequences doctrine should apply; and (3) the fraudulent concealment tolling

provision in MCL §600.5855 should also apply. Underlying these arguments are three premises: (A) that Plaintiffs are not required to identify when their claims accrued; (B) that the harsh and unreasonable consequences doctrine remains good law; and (C) that a statute expressly applicable to statutes of limitations also applies to a notice provision in the Court of Claims Act. Plaintiffs' underlying premises are without merit, and their arguments thus fail.

While MCL §600.6431 does not itself grant immunity to a state actor, a potential plaintiff must satisfy this notice requirement to plead in avoidance of governmental immunity. *Fairly v Dep't of Corrections*, 497 Mich 290, 297 (2015). Furthermore, a plaintiff bears the burden of pleading in avoidance of governmental immunity. *Hannay v DOT*, 497 Mich 45, 58, 860 NW2d 67, 75 (2014). Thus, a plaintiff must plead satisfaction of the notice requirement, which requires that they plausibly allege that they either brought suit or provided the requisite notice within 6 months of when their claim accrued. *See* MCL §600.6431(3). And, as previously shown, Plaintiffs' claim accrued when "the wrong upon which the claim is based was done regardless of the time when the damage results." *See Henry v Dow Chem Co*, 905 NW2d 601 (2018) (*citing Trentadue v Buckler Automatic Lawn Sprinkler Co*, 79 Mich 378, 387, 738 NW2d 664 (2007)).

Plaintiffs' argument, that a question of fact exists regarding when their claim accrued, is thus without merit. They do not plausibly allege that *the wrong* on which their claims are based occurred within six months of their filing suit, but only allege that the damages allegedly became apparent to them within six of when they filed suit. The Court of Appeals erred by accepting their argument because, in doing so, it judicially relieved Plaintiffs of the obligation to strictly comply with the MCL §600.6431(3) notice requirement.

The Court of Appeals also erred by recognizing the existence of a "harsh and unreasonable consequences" doctrine. As previously noted, that doctrine arose out of case law which has since been overruled by this Court in *Rowland* and *McCahan*. *See, e.g.*, *Rowland*, 477 Mich at 206-07

(abrogating *Reich v State Highway Dep't*, 386 Mich 617 (1972)). The Court of Appeals' application of that exception was therefore in error because it judicially relieved Plaintiffs of the obligation to comply with the MCL §600.6431(3) notice requirement.

Likewise, the Court of Appeals erred by applying the fraudulent concealment tolling statute to this issue. By its own terms, that statute applies to "the period of limitations." MCL §600.5855. A notice requirement is not a "period of limitations." Those subjects are addressed in separate sections of the Court of Claims Act. *Compare* MCL §600.6431 *with* MCL §600.6452. Furthermore, Section 6452 of the Court of Claims Act, which specifically incorporates the provisions of Chapter 58 (including the fraudulent concealment tolling provision), limits the application of those provisions "to the limitation prescribed in this section." MCL §600.6452(2).

The Court of Appeals thus erred when it excused, under any of those theories, Plaintiffs' failure to satisfy MCL 600.6431's notice requirement. This Court's clear direction to the lower courts is that such requirements must be strictly enforced, in deference to the policy judgments of the Legislature. Reversal of the Court of Claims, on this ground alone, is therefore warranted.

B. THE COURT OF APPEALS FAILED TO CONDUCT THE CORRECT ANALYSIS REGARDING WHETHER A DAMAGES REMEDY FOR A CONSTITUTIONAL TORT IS APPROPRIATE HERE

In *Smith v State*, 428 Mich 540, 637-52 (1987) (Boyle, J., concurring in part) and *Jones v Powell*, 462 Mich 329 (2000), this Court set forth the analysis for determining whether a judicially created damages remedy is appropriate for alleged violations of the Michigan constitution. Despite this, the Court of Appeals concluded that a damages remedy was available here without conducting that analysis. Plaintiffs' Answer does not contest this, but instead argues that a damage claim should be allowed under the very different federal law analysis of *Fitzgerald v Barnstable School Committee*, 555 US 246 (2009) and *Boler v Earley*, 865 F3d 391 (6th Cir. 2017). Plaintiffs' argument is misguided not only because it reflects federal, and not state, law, but because the federal cases address a different question, one that is the opposite of the question presented here.

42 USC §1983 creates an express damages remedy for violation of federal civil rights. *See* 42 USC §1983. *Fitzgerald* (and *Boler*) sets forth the analysis to be used when determining whether a *federal* statute precludes this express remedy. Given the importance of §1983 in the federal legal scheme, the Supreme Court of the United States held that to determine whether Congress intended that a federal statute preclude claims under §1983, a court must analyze (1) whether the federal statute constituted a comprehensive remedial scheme, and (2) whether a comparison of the substantive rights and protections under the statute and the constitutional provision in question was indicative of an intent to preclude claims under §1983. *Fitzgerald*, 555 US at 252-57.

However, no express vehicle, comparable to that of 42 USC §1983, exists under Michigan law. Instead, *Smith* recognized an *implied* remedy for certain constitutional tort claims. That implied remedy is inappropriate where other statutes provide a remedy, because "the stark picture of a constitutional provision violated without remedy is not presented." *Jones*, 462 Mich at 336 (quoting *Smith*, 428 Mich at 647).

In other words, the question here is whether a damage claim should be implied where there is no textual basis for such a claim and where statutes provide a remedy (even if that remedy is not what Plaintiffs would prefer), while in the federal cases the question was whether an express statutory damage remedy should be barred by implication. *Jones*, adopting the concurrence of Justice Boyle in *Smith*, held that under Michigan law, constitutional torts are only available as "a narrow remedy against the state on the basis of the unavailability of any other remedy." *Jones*, 462 Mich at 337. Justice Boyle, in her *Smith* concurrence, looked to the Supreme Court's treatment of *Bivens* claims for guidance, and noted that *Bivens* actions were disfavored where the legislature had expressed clear public policy decisions regarding a specific subject. *Smith*, 428 Mich at 647-48. *Bivens* is the correct federal analogy to the issue here, because *Bivens* also addressed the question of whether a damage remedy for constitutional violations should be judicial created.

Here, other remedies are available, including the federal SDWA, federal §1983, and Michigan SDWA. Thus, under the *Jones* and *Smith* analysis, no damage remedy should be judicially created here, because the remedies available reflect the public policy decisions of the Legislature. The Court of Appeals thus erred on this issue and reversal is warranted.

C. PLAINTIFFS HAVE NOT SHOWN HOW THE COURT OF APPEALS COULD HAVE CONCLUDED, WITHOUT RELYING UPON UNSUPPORTED, CONCLUSORY ALLEGATIONS, THAT THE FORMER EMERGENCY MANAGERS COMMITTED THE ALLEGED CONSTITUTIONAL VIOLATION

Plaintiffs' also cite the Court of Appeals decision below, in an attempt to excuse their failure to allege, with any particularity, how the former Emergency Managers committed the purported violation. However, their argument is essentially circular and fails to address the issue involved: whether Plaintiffs were required to allege what each former Emergency Manager (and the other defendants) purportedly did to violate Plaintiffs' bodily integrity right under the Michigan Constitution. It is long established that "[t]he mere statement of the pleader's conclusions . . . unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action." *Koebke v La Buda*, 339 Mich 569, 573, 64 N.W.2d 914, 916 (1954).

Here, the Court of Appeals, and Plaintiffs' Answer, relied entirely upon the conclusory allegations in Plaintiffs' complaint. Neither the Court of Appeals opinion nor the Plaintiffs' Answer identified a *single* factual allegation, asserted against either of the former Emergency Managers, that supported the conclusion that the EMs invaded Plaintiffs' bodily integrity. The Court of Appeals thus mistakenly concluded that Plaintiffs' allegations were sufficient.

This lack any specific factual reference to the EMs should have resulted in the dismissal of Plaintiffs' claims against the former Emergency Managers due to the failure to allege how their decisions individually violated the plaintiffs' constitutional rights under the Michigan Constitution. Reversal of the lower court as to this issue is therefore warranted.

D. THE COURT OF APPEALS DETERMINATION, THAT PLAINTIFFS WERE SIMILARLY SITUATED TO ALL OTHER MUNICIPAL WATER USERS IN THE STATE, RENDERS THAT ELEMENT OF AN INVERSE CONDEMNATION CLAIM ESSENTIALLY MEANINGLESS

Plaintiffs also argue that the Court of Appeals was correct when it compared Plaintiffs and their purported class, all water users in the City of Flint, to all municipal water users in the State of Michigan. However, this Court held in *Spiek v DOT*, that an inverse condemnation claim exists only where the plaintiff can allege "a unique or special injury . . . different in kind and not simply degree, from the harm suffered by all persons similarly situated." *Spiek v DOT*, 456 Mich 331, 348, 572 NW2d 201 (1998). This Court expanded on its reasoning as follows: "Where harm is shared in common by many members of the public, the appropriate remedy **lies with the legislative branch and the regulatory bodies created thereby**, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways." *Id.* at 349 (emphasis added).

The claims here arise out of the regulation and administration of the City of Flint's municipal water treatment and distribution system. Plaintiffs, and their prospective class, are simply not similarly situated with any municipal water users except those serviced by the City of Flint. For example, the City of Flint's water users do not share a common water source, water treatment plant, or local government with any other water users in the State of Michigan. An inverse condemnation claim is thus inappropriate here, and the Court of Appeals erred by permitting that claim to survive.

E. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT EMS ARE "STATE OFFICERS" AND "STATE EMPLOYEES" SUBJECT TO COURT OF CLAIMS JURISDICTION

In their Answer to the State's Application, the EMs argued that the Court of Appeals correctly concluded that EMs are "state officials" subject to the Michigan Court of Claims and showed why this Court need not review that decision. The Plaintiffs' Answer advanced arguments

that suggested (but did not fully explore) two additional bases to support the intermediate court's decision on this issue. The EMs take this opportunity to address those arguments.

1. The EMs' contracts with the State do not make them independent contractors

The State argued in its Reply that the Court of Appeals erred in holding EMs to be "state officials," noting, *inter alia*, that Section 5.8 of the employment contract between the State and the EMs called the EMs independent contractors. As a threshold matter, the Court should not permit the State to inject a new legal argument at this stage of the proceedings. A party generally may not raise new or additional arguments in its reply brief. *Cf.* MCR §7.212(G); *Kinder Morgan of Mich, LLC v City of Jackson*, 277 Mich App 159, 174; 744 NW2d 184 (2009).

However, even if the Court entertains this new argument, the argument fails to show how the Court of Appeals erred on this issue. First, as Plaintiffs observed, political appointees—like the EMs who "serve at the pleasure of the governor"—are at-will employees as a matter of law. *James v City of Burton*, 221 Mich App 130, 133–34; 560 N2d 668 (1997). Second, outside the context of political appointments, the distinction between employee and independent contractor is assessed under the economic-reality test, not the label used by a party. *Clark v United Techs Automotive, Inc*, 459 Mich 681, 688; 594 NW2d 477 (1999); *Kidder v Miller-Davis Co*, 455 Mich 25, 42; 564 NW2d 872 (1997);[1] *Adanalic v Harco Nat'l Ins Co*, 309 Mich App 173, 191; 870 NW2d 731 (2015); *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 623; 335 NW2d 106 (1983); *Wells v Firestone Tire & Rubber*, 421 Mich 641, 647; 364 NW2d 670 (1984); *Farrell v Dearborn Mfg Co*, 416 Mich 267; 330 NW2d 397 (1982).

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[1] *Kidder* applied the economic-reality test in a workers' compensation case. Amendments to the Act have since replaced the economic-reality test with the 20-factor test used by the IRS, MCL 418.161(1)(n), but Michigan courts continue to apply the economic-reality test adopted in *Kidder* in place of the old common-law control test, as the rest of the cases in this string cite show.

The economic-reality test balances four factors, none of which is controlling: (*a*) who controls the worker's duties; (*b*) who pays the worker's wages, (*c*) who has the right to hire, fire, and discipline the worker; and (*d*) whether the performance of the worker's duties are an integral part of the alleged employer's business towards the accomplishment of a common goal. *Adanalic*, 309 Mich App at 191. There can be no reasonable debate that EMs are employees of the State under this test: (*a*) the State controls the EMs' actions; (*b*) the State pays the EMs' wages; (*c*) the State alone has the right to hire, fire, and discipline the EMs; and (*d*) the EMs' activities are a part of the State's business—the self-granted statutory right to commandeer financially troubled political subdivisions.

The State's arguments that the EM's are not State employees thus lacks merit.

2. ***Schobert* supports the decision below because it recognizes that public-sector workers can be State officials for some purposes**

In addition, Plaintiffs correctly point out that State Defendants misinterpret *Schobert v. Inter-County Drainage Board of Tuscola, Sanilac & Lapeer Counties for White Creek No 2 Inter-County Drain*, 342 Mich 270, 280-281, 69 NW2d 814 (1955). In *Schobert*, the Court held that the meaning of "state officer" under the Michigan Constitution of 1963 was flexible and could indeed refer to traditionally local officials depending on context, in contrast to the more limited definition given that term under the Michigan Constitution of 1908:

> It is clear from what has this far been observed that in one sense of the term a State officer is one who exercises a portion of the sovereign powers on a statewide basis, normally from the seat of government, such as the attorney general, ***while in another, a State officer is any official whatsoever whose duties embrace the implementation of sovereign policy, however expressed, such as the village constable*.** From such dichotomy we derive no comfort, however, for it is equally clear that ***the term "State officer" will vary in content with its use and context, and that the same officeholder may be an officer of the State for one purpose and not for another.*** Thus we might well hold that a county, township, or municipal election official is a State officer as concerns the duty of State officers to administer constitutional rights equally to all races, while

> at the same time denying that he is a State officer to the extent that a vacancy in his office could only be filled by the governor by and with the advice and consent of the senate.
>
> We are not so bold as to attempt an all-embracing definition of "State officer." The precise delineation of the term will await our rulings as cases are brought before us. In each instance ***the meaning of the term 'State officer' will be governed by the purpose of the act or clause in connection with which it is employed.***

Id. at 280–281 (internal citations omitted) (emphases added).

As both Plaintiffs and the Court of Appeals recognized, the central concern here is the subject-matter jurisdiction of the Court of Claims and the scope of that jurisdiction, in light of its reference to jurisdiction over claims against State employees and State officers. Thus, rather than conflict with the lower court's decision, *Schobert* reinforces that the Court of Appeals conducted the correct analysis here: it focused on the purpose and meaning of the jurisdictional provisions in the Michigan Court of Claims Act to construe the terms "employee" and "state officer" under that Act. This approach is consistent with the canon of statutory construction that, "[w]here a statute supplies its own glossary, courts may not import any other interpretation but must apply the meaning of the terms as expressly defined." *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001) (citing *Harder v Harder*, 176 Mich App 589, 591; 440 NW2d 53 (1989)).

The State Defendants' reliance on *Evanston YMCA v State Tax Commission*, 369 Mich 1, 8; 118 NW2d 818 (1962), is also misplaced. In their Reply to the EM's Answer, the State Defendants cited *Evanston* for the proposition that the "specific" provisions of PA 436 govern over the general provisions of the Court of Claims Act. But *Evanston* applies that rule to different sections of the ***same*** statute, not different statutes such as PA 436 and the Court of Claims Act:

> When we construe statutory language containing both specific and general provisions, we adopt the rule set forth in 50 Am. Jur., Statutes, § 367, p. 371:
>
> Where there is ***in the same statute*** a specific provision, and also a general one which in its most comprehensive sense would include

> matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provision.

Ibid. (emphasis supplied).

In sum, the Court of Appeals correctly concluded EMs are State employees, (Op. at 21), who therefore fall within the definition of "State officials" subject to the jurisdiction of the Court of Claims under the Michigan Court of Claims Act. Accordingly, this Court should affirm the lower court's holding that EMs are State officials and State employees.

III. CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Darnell Earley and Gerald Ambrose, former Emergency Managers for the City of Flint, respectfully request that this court grant leave to appeal on all issues or, in the alternative, that that this Court issue an order reversing the Court of Appeals as to the issues raised here and directing entry of summary disposition as to the former Emergency Manager. The former EMs also respectfully request that this Court deny leave to appeal as to the Court of Appeals holding that they were state officials as defined by the Court of Claims Act.

Respectfully submitted,

Dated: May 23, 2018

/s/ William Y. Kim

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PROOF OF SERVICE

The undersigned certifies that on May 23, 2018, I directed that a copy of the City of Flint's Application for Leave to Appeal to be served upon the attorneys of record in the above cause by filing them with the TrueFiling system, which will serve copies on all attorneys of record who appeared below.

Respectfully submitted,

Dated: May 23, 2018

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